CHANG MING FENG & ANOR *a*

v.

JACKSON LIM

HIGH COURT SABAH & SARAWAK, MIRI *b*
IAN HC CHIN J
[CIVIL APPEAL NO: 12-07-97 (MR)]
2 NOVEMBER 1998

DAMAGES: *Personal injuries - Loss of future earnings - Increment in salary - Whether increment in salary from date of accident to date of trial ought to be considered - Whether increment that claimant would have earned had he continued in his position ought to be considered - Civil Law Act 1956, s. 28A(2)(c)(ii)* *c*

DAMAGES: *Personal injuries - Loss of future earnings - Allowances - Whether allowances constitute earnings - Whether allowances must be considered in awarding loss of future earnings* *d*

DAMAGES: *Personal injuries - Pain, suffering and loss of amenities - Overlapping - Claim for more than one injury - What must be shown to prove that award was excessive due to overlapping - Whether lower court must expressly state that element of overlapping considered - Higher awards given in other cases - Whether award manifestly excessive* *e*

DAMAGES: *Personal injuries - Pain, suffering and loss of amenities - Failure to plead injuries - Evidence of injuries adduced without objection notwithstanding failure to plead - Whether damages for such unpleaded injuries may be awarded* *f*

This was an appeal against the quantum of damages awarded by the Sessions Court in respect of a personal injury suit. The appellants argued that the award for pain, suffering and loss of amenities and the award for loss of earnings were excessive. *g*

With regards the award for pain, suffering and loss of amenities, the appellants contended that certain injuries which were not pleaded were nonetheless taken into account by the Sessions Court and thus the award for this head ought to be reduced. Notwithstanding the failure to plead these injuries, evidence of it was adduced and the quantum in respect of these injuries was fully canvassed in the lower court. Additionally, the appellants also asserted that the court failed to make an allowance for overlapping. As opposed to this, the respondent argued that since there were higher awards for similar injuries which the court did not follow, the court must have taken into account overlapping. *h* *i*

As to the sum awarded for loss of earnings, the thrust of the appellants' argument was that the lower court judge failed to deduct the respondent's increase in basic salary. As a result of the accident, the respondent could not continue in his position as an offshore production technician which entitled him to a certain allowance. He assumed a different position in the same company and this resulted in him earning a reduced allowance. His basic salary, however, was increased. In arriving at a multiplicand, the judge in the lower court deducted the allowance he was earning in his new position and a further sum for living expenses from the allowance he formerly earned. The appellants argued that the increase in basic salary should also have been deducted whereas the respondent contended that increase in basic salary should not be taken into account because, firstly, basic salary would increase in any event and, secondly, allowances are different from salary. The respondent also argued that s. 28A(2)(c)(ii) of the Civil Law Act 1956 ('the Act') prevents the court from taking into account any increase in salary as at the date of trial.

Held:

[1] Evidence adduced without objection has the effect of curing the absence of a plea in the statement of claim. Here, since evidence of the injuries was adduced and the quantum in respect of the injuries was fully canvassed in the lower court, the ground of appeal based on the failure to plead the injuries had no merit.

[2] To conclude that the element of overlapping was considered by the lower court, an express statement to that effect was necessary. There was no such expression in the lower court's judgment.

[2a] Apart from having to show the failure to take into account the element of overlapping, it must also be shown that the award was manifestly excessive or unreasonable as to warrant setting aside. This further burden was also on the appellants but they failed to show how the award could be said to be manifestly excessive or unreasonable.

[2b] The court could not see how the award could be regarded as manifestly excessive or unreasonable when cases showed that much higher awards were given before.

[3] With regards loss of future earnings, what the court must take into account is the "earnings" of which salaries would without argument constitute such. "Allowances" are also "earnings". The overall earnings must be considered by the court to see whether there is any loss.

[4] The phrase "… the court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future," appearing in s. 28A(2)(c)(ii) of the Act makes it clear that the court must not speculate. It does not say that the court should ignore the reality of the situation where the respondent's basic salary, a constituent part of the "earnings", has been increased at the date of the trial. The increase in that part of the earnings is actual not prospective. Therefore, s. 28A(2)(c)(ii) of the Act does not prevent the court from taking into account the actual increase in the basic salary which the respondent was earning at the date of trial in order to arrive at a just award since that section applies to a prospective or speculative situation and not the actual.

[5] Section 28A(2)(c)(ii) of the Act should also not prevent the taking into account of the fact that the respondent, if he had continued in his previous job, would have commanded an increased salary due to increment if there was evidence of such.

[5a] There was no evidence to support the summation that the basic salary the respondent earned before the accident would on account of increment have matched the salary earned by the respondent at the time of trial and that, therefore, the increase in the basic salary should be ignored. Consequently, the lower court erred when it failed to take into account the increase in salary.

[Award for pain, suffering and loss of amenities maintained; award for loss of future earnings reduced.]

Cases referred to:
Billingham v. Hughes [1949] 1 KB 634 ***(aff)***
Lau Ee Ee v. Tan Kin Kwong [1986] 1 MLJ 308 ***(refd)***
Mahamad bin Mahamad Said & Anor v. Perianayagam & Anor [1972] 1 MLJ 67
Marappan & Anor v. Siti Rahmah Ibrahim [1990] 1 CLJ 32 ***(aff)***
Nagarajan Veerapan v. Ananthan Parama Sivam & Anor [1989] 2 CLJ 1243 ***(aff)***
Ngooi Ku Siong & Anor v. Aidi Abdullah [1984] 2 CLJ 163 ***(aff)***
Superintendent of Lands & Surveys, 4th Division & Anor v. Hamit Matusin & Ors [1994] 3 CLJ 567 ***(aff)***
The 'KoheKohe' [1985] 2 MLJ 422 ***(aff)***
Tiong In Chiong v. Giovanni Vinetti [1984] 2 MLJ 169 ***(aff)***

Legislation referred to:
Civil Law Act 1956, s. 28A(2)(c)(ii)

For the appellants - Marina Foo; M/s Tang & Partners
For the respondent - MS Sandhu; M/s MS Sandhu & Co

Reported by S Dharmendran

JUDGMENT

Ian HC Chin J:

Introduction

This is an appeal by Chang Ming Feng and Sim Ah Hong @ Sim Geok Hong ("the appellants") against the quantum of damages awarded to Jackson Lim @ Jackson Ak Bajut ("the respondent") in a negligence suit by the Sessions Court in a judgment handed down on 10 May 1997. The relevant part of the award that the appellants want the court to disturb is: (1) the sum of RM30,500 for pain, suffering and loss of amenities and (2) the sum of RM61,560 for loss of earnings.

Facts Of Case

The facts that need detain our attention are these. The respondent was and still is an employee of Sarawak Shell. On 30 May 1993 he was driving a vehicle when he met with an accident and sustained serious injuries which the appellants were held by the Sessions Court to be wholly liable. The respondent was thereafter on sick leave for four months and when he resumed work he could only perform light duties and was not able to do offshore work anymore as an offshore production technician which work would earn him offshore allowances, namely, roster allowance, fixed over-time allowance and location allowance. I turn now to the grounds of appeal concerning the award for pain, suffering and loss of amenities.

Pain, Suffering And Loss Of Amenities

The sum of RM30,500 that was awarded for pain, suffering and loss of amenities is made up of RM3,500 for lacerated wound and three scars, RM8,000 for fracture of right femur (closed comminuted), RM8,000 for fracture of left femur (comminuted) and RM11,000 for fracture of patella with residual disabilities of the right knee. Ms. Marina Foo, learned counsel for the appellants, argued that the three scars were not pleaded and therefore there should not be any award for those injuries. The award of RM3,500 should on account of that be reduced to RM1,000. The learned Sessions Court judge conceded that the scars were not pleaded and referred to *Lau Ee Ee v. Tan Kin Kwong* [1986] 1 MLJ 308, where Chong Yik Liong J said:

> In my view, in a running down action where negligence is proved or admitted, a plaintiff is entitled to be awarded damages only in respect of injuries which are pleaded and which are proved, or admitted, to have been caused by the negligence of the defendant.

What is said in that case must be read in the light of the Supreme Court decision of *Superintendent of Lands & Surveys, 4th Division & Anor v. Hamit bin Matusin & Ors* [1994] 3 CLJ 567; [1994] 3 MLJ 185 which held that evidence adduced without objection has the effect of curing the absence of a plea in the statement of claim. In this case the evidence of the scars was adduced without objection. Furthermore, the quantum in respect of the scars was fully canvassed in the lower court by counsel for both parties. Therefore, there is no merit in this ground of appeal.

The next ground of appeal concerning this head of award is that the learned Sessions Court judge had made no allowance for overlapping, citing *Mahamad bin Mahamad Said & Anor v. Perianayagam & Anor* [1972] 1 MLJ 67 FC, 68 where it was said:

> ... we do not think that the learned judge should have taken compensation for each of the two injuries suffered by the plaintiff separately and then just have added them up at the end. The items are not separate heads of compensation. They are only aids at arriving at a fair and reasonable compensation. See *Fletcher v. Autocar and Transporters Ltd.* [1968] 1 All ER 726, 733. There is an element of overlapping when two or more injuries are suffered simultaneously.

Mr. M.S. Sandhu, learned counsel for the respondent, replied that the learned Sessions Court judge must have taken overlapping into account because "there were higher awards for similar injuries which she did not follow". The learned Sessions Court judge had followed the submission of Mr. Sandhu in itemising the awards but did not follow the figure of RM38,500 prayed for by Mr. Sandhu. She, it will be recalled, only awarded RM30,500. Could it then be assumed that she had given the sum of RM30,500 instead of RM38,500 to take into account the overlapping? In my view, no such assumption can be had when what was required was an express statement that she had taken into consideration the element of overlapping. There was no such expression in her judgment. Furthermore, I am of the respectful view that she had been led into the error because learned counsel when making his submission at the lower court also did not take note of this element of overlapping. The lesser figure she awarded could very well be due to the fact that the cases cited by Ms Foo supported such a lower figure. But the appellants carry the further burden of showing that the award was manifestly excessive or unreasonable because apart from having to show the failure to take into account the element of overlapping it must also be shown that the award was manifestly excessive or unreasonable as to warrant setting aside (*Ngooi Ku Siong & Anor. v. Aidi Abdullah* [1984] 2 CLJ 163; [1985] 1 MLJ 30 FC). Ms. Foo did not show how the award can be said to be manifestly excessive or unreasonable and I

cannot see how the award can be regarded as such when the cases show that much higher awards were given before. I find no merit in this ground of appeal. This takes me to the last ground of appeal which is with regards to the loss of future earnings.

Loss Of Future Earnings

Before the accident the respondent was in 1993 working offshore and earning a monthly pay of RM2,432.28 which was made up of basic salary of RM1,657 and offshore allowances of RM775.28. At the time of the trial in 1995 the respondent could no longer work offshore but his monthly pay was then RM2,256.78 which was made up of his basic salary of RM 2,009 and allowances of RM247.78. The learned Sessions Court judge was of the view that the offshore allowances of RM775.28 that the respondent could no longer earn constituted a loss of earnings. For the purpose of arriving at a multiplicand she deducted from that sum of RM775.28 the allowances of RM247.78, which the respondent was earning at the time of trial, and a further sum of RM100 for living expenses. This leaves the multiplicand of RM427.50 (RM775.28 – RM247.78 – RM100) which produced, after applying the multiplier of 12 years, the said award of RM61,560 for loss of future earnings. She did not take into account the increase of RM352 in the basic salary at the date of trial.

Miss Foo submitted the multiplicand adopted by the Sessions Court judge was incorrect as she failed to take into account the increase in the basic salary of the respondent at the date of the trial. Miss Foo submitted that if the increase in basic pay was taken into account the difference in the income of the respondent before the accident and at the time of the trial would be only RM175.50 instead of RM775.28. Learned counsel further contended the multiplicand should only be RM75.50 after deduction of RM100 for living expenses.

Mr. Sandhu for the respondent argued that the increase in basic pay should not be taken into account, as the basic pay would go up in any event. What the respondent lost because of the accident was his offshore allowances totalling RM775.50 and that is separate from his salary. Mr. Sandhu also referred to s. 28A(2)(c)(ii) of the Civil Law Act 1956 which says:

> (c) in awarding damages for loss of future earnings the court shall take into account -
>
> (i) …
>
> (ii) only the amount relating to his earnings as aforesaid at the time when he was injured and the court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future;

Mr. Sandhu is treating the allowances as different from salary in order, firstly, to take advantage of the fact that the respondent was earning less allowances and, secondly, to disregard the increase in the basic salary as at the trial. That approach is not permissible because what the court must take into account is the "earnings" of which salaries would without argument constitute such. This leaves the question of the "allowances" and whether they constitute "earnings". Mr. Sandhu did not argue why the "allowances" cannot be "earnings" but the fact that the respondent is claiming loss of future earnings in respect of those allowances defeats any argument that such allowances cannot be earnings. In *Marappan & Anor v. Siti Rahmah bte Ibrahim* [1990] 1 CLJ 32; [1990] 1 MLJ 99 SC the Supreme Court held that allowances given to a teacher while being trained as a teacher were "earnings" within the meaning of s. 28A(2)(c)(i) of the Civil Law Act. Thus, I do not see how in the present case, the "allowances" cannot be treated as "earnings". It was also held in *Nagarajan a/l Veerapan v. Ananthan a/l Parama Sivam & Anor* [1989] 2 CLJ 1243, 1246, that such allowances are earnings. Therefore, since allowances are also earnings, the overall earnings must be considered to see whether there was any loss.

It was then contended by Mr. Sandhu that s. 28A(2)(c)(ii) prevents the court from taking into account the increase in the basic salary which amounted to RM352. Does that section, then, have the effect of preventing the court from taking into account the increase in the salary at the date of trial? Mr. Sandhu did not refer to any authorities. That section came into force on 1 October 1984. The law has been that a plaintiff must give credit for what he will actually receive (*Billingham v. Hughes* [1949] 1 KB 634; *Tiong In Chiong v. Giovanni Vinetti* [1984] 2 MLJ 169; *The 'KoheKohe'* [1985] 2 MLJ 422). In my view s. 28A(2)(c)(ii) does not in any way change that aspect of the law. The language of that section also makes it clear when it talks of "prospect of the earnings as aforesaid being increased at some time in the future" which the court must not speculate. It does not say that the court should ignore the reality of the situation where the respondent's basic salary, a constituent part of the "earnings", had been increased at the date of trial. The increase in that part of the earnings is actual not prospective. Therefore, I am of the view that s. 28A(2)(c)(ii) does not prevent the court from taking into account the actual increase in the basic salary which the respondent was earning at the date of trial in order to arrive at a just award since that section applies to a prospective or speculative situation and not the actual. Conversely, that section should also not prevent the taking into account of the fact that the respondent, if he had continued in his previous job, would have commanded an increased salary due to increment if there is evidence of such. Is there, then, any evidence that the respondent if he had continued in his previous position would

have commanded the same basic salary in 1993 as in his new position? In this regard Mr. Sandhu contended that there is no evidence that the respondent's basic salary if he had continued in that position till the date of trial would not, by increments, have increased to the basic salary that the respondent was earning as in 1995. That, in my view, is asserting in a pregnant negative way that the respondent's basic salary in 1993 would have increased in 1995. Since that is the respondent's assertion, he carries the burden of proving it and not otherwise contended by Mr. Sandhu. It is a notorious fact that no salary would remain static and also that there will be a maximum salary unless there is a promotion. Even though there is, in p. 101 of the Appeal Record, evidence in the form of a document called "SSB SARAWAK SHELL EMPLOYEES UNION COLLECTIVE AGREEMENT" enumerating the starting salary and the maximum salary of 11 different scales of salary, it is not clear to which scale the respondent belongs to in 1993 and in 1995 and whether he had reached the maximum salary. Therefore, even assuming that I can resort to this evidence, which neither learned counsel has referred to, I am still unable to say that the 1993 salary was not the maximum salary. Unless it can be established that he had not reached the maximum salary can it then be said that there will be annual increment. Even if it can be established that he has not reached his maximum salary, then it will be necessary to determine the amount of the annual increment since there are 11 scales with 11 different annual increments ranging from RM44 to RM89. Even taking the highest increment of RM89 it would still not make up for the difference of RM352 between the 1993 and 1995 salaries since three years increment would only give RM267. Therefore, I am unable to find any evidence to support the summation that the basic salary that the respondent earned in 1993 (before the accident) would on account of increment have matched that of the salary earned by the respondent in 1995 and that, therefore, the increase in the basic salary should be ignored. Consequently, Ms. Foo is correct in her contention that the lower court has erred when it failed to take into account the increase of RM352. Therefore, the multiplicand should only be RM75.50 and when applied with the multiplier of 12 should result only in an award of RM10,872.

Conclusion

In the premises, I would allow the appeal to the extent I have indicated, which is that the lower court's award of RM61,500 for loss of future earnings is set aside and in its place the award of RM10,872 is substituted. Costs to the appellant.